88-261

No.

In The

Supreme Court of the United States

October Term, 1987

MARILYN ARONS,

Petitioner,

v.

NEW JERSEY BOARD OF EDUCATION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Does the Education for All Handicapped Children Act authorize non-lawyer experts in the problems of handicapped children to represent parents at hearings held under the Act, or merely allow them to be present and give advice?

2. If non-lawyer experts are entitled to represent parents at such hearings, is a state court rule which forbids non-lawyers from charging their clients a fee for such representation preempted by the Act or in violation of the Equal Protection Clause of the Fourteenth Amendment?

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*In addition to the parties listed in the caption, Ronald I. Parker, Saul Cooperman, and Jeffrey Osowski, who are employed by the State of New Jersey Board of Education or Office of Administrative Law, are also respondents in this proceeding.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Marilyn Arons respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 842 F.2d 59 (1988) and is reproduced in the Appendix ("App.") at pages 1a-12a. The order and memorandum opinion of the district court are not reported and are reproduced at App. 14a-37a.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1988. By order dated June 9, 1988, Justice Brennan extended the time for filing this petition to and including August 13, 1988. App. 38a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

The Education for All Handicapped Children Act provides, in pertinent part, that:

> Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions . . ..

42 U.S.C. § 1415(d).

Rule 1:21-1 (Practice of Law) of the Supreme Court of New Jersey, as amended in 1983, provides, in pertinent part, that:

> (e) Appearances Before Office of Administrative Law. Subject to such limitations and procedural rules as may be established by the Office of Administrative Law, an appearance by a non-attorney in a contested case before the Office of Administrative Law may be permitted, on application, in any of the following circumstances:

(1) Where required by federal statute or regulation;

* * *

No representation or assistance may be undertaken pursuant to subsection (e) by . . . any person who receives a fee for such representation.

STATEMENT OF THE CASE

Petitioner Marilyn Arons is a specialist in curriculum development for handicapped children. She is not an attorney. For the past decade, Ms. Arons has served as a lay advocate representing parents of handicapped children in administrative due process hearings within the State of New Jersey's Office of Administrative Law. These hearings are held to resolve disputes over the educational opportunities to be afforded to handicapped children under the Education for All Handicapped Children Act of 1975 ("EAHCA" or "Act"), 20 U.S.C. § § 1401, *et seq.* EAHCA guarantees handicapped children a right to suitable public education and establishes an administrative dispute-resolution system to enable parents of handicapped children to enforce their children's rights under the Act.

Ms. Arons works full-time representing parents of disabled children in administrative proceedings under EAHCA, and she wishes to charge a fee to those clients who can afford it. Pursuant to Rule 1.21-1(e) of the Rules of the Supreme Court of New Jersey, Ms. Arons is entitled to represent parties in administrative proceedings under EAHCA in precisely the same manner as an attorney because, in New Jersey's view, the EAHCA requires the state to permit lay representation. However, that Rule also expressly forbids non-lawyers such as petitioner from "receiv[ing] a fee for such representation."

On January 7, 1985, Ms. Arons filed a complaint under 42 U.S.C. § 1983 in the United States District Court for the District of New Jersey, challenging, *inter alia*, the constitutionality of the no-fee rule on two grounds.[1]

First, petitioner argued that the rule was preempted by the EAHCA. Pointing to the mandate in EAHCA that parties have the "right to be accompanied and advised . . . by individuals with special knowledge and training," Ms. Arons argued that EAHCA affirmatively authorized lay representation. In light of that authorization, Ms. Arons contended that New Jersey may not, consistent with the Act, impose conditions such as the no-fee rule that substantially burden the exercise of her right to represent parties in EAHCA proceedings and the parties' right to have Ms. Arons as their advocate. *See generally Sperry v. The State of Florida ex rel. The Florida Bar*, 373 U.S. 379 (1963).

Second, Ms. Arons asserted that the no-fee rule violated the Equal Protection Clause of the Fourteenth Amendment by impermissibly discriminating against non-lawyers. She argued that the justifications for the rule — to discourage the proliferation of lay advocates and to prevent confusion between lay advocates and lawyers — were insufficient even under the rational basis test. In her view, New Jersey's goal of discouraging lay advocates by denying them fees was impermissible in light of EAHCA's clear purpose of encouraging lay representation. She further contended that the rule was not reasonably related to the state's asserted interest in preventing confusion on the part of the public because there were far more direct means to achieve that goal, and, in any

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[1]Ms. Arons, who was proceeding *pro se* at the time, did not specify a jurisdictional provision in her complaint. It is clear, however, that the court had jurisdiction under 28 U.S.C. § § 1331 and 1343(3).

event, New Jersey law already forbids non-lawyers from even suggesting that they are attorneys. N.J.S.A. 2A:170-78.

The district court granted summary judgment to respondents. App. 14a. In reviewing petitioner's claim "that she should be permitted to receive compensation for her lay advocacy work," the court looked to the language of EAHCA. Finding no unmistakable congressional mandate permitting lay advocates to charge fees, the court held that it should not imply one. App. 24a. The court also rejected petitioner's equal protection claim. After observing generally that "the Supreme Court of New Jersey could have chosen to ban any practice of law by persons unlicensed," the court concluded that there was adequate justification for New Jersey's distinction between attorneys and non-attorneys for compensation purposes. App. 27a-28a.

The Third Circuit affirmed, but for different reasons. The court did not dispute petitioner's assertion that activities authorized by EAHCA could not be discouraged by the states through the denial of compensation. However, the court read the EAHCA quite differently than did the district court and the State of New Jersey, which had allowed Ms. Arons to provide legal representation in EAHCA hearings for eleven years because it believed that it was compelled to do so as a matter of federal law. In sharp contrast, the court held that section 1415(d)(1) of EAHCA, which states that "[a]ny party to any hearing" may be "accompanied and advised by . . . individuals with special knowledge or training" in the problems of disabled children, does *not* authorize lay advocates to provide legal representation in EAHCA proceedings. App. 7a. In the court's view, all that such experts may do at EAHCA hearings is be present and give off-the-record advice. Thus, the court found no preemption here because New Jersey's no-fee rule does not prohibit petitioner from being paid for activities author-

ized by he Act—*i.e.*, rendering advice and assistance, but only for an unauthorized activity, namely providing legal representation. The court also rejected petitioner's equal protection claim. Citing this Court's decision in *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), the court reasoned that, under its reading of the Act, since New Jersey could ban nonlawyers from providing legal representation to parties in EAHCA hearings, it could certainly impose the less intrusive measure of prohibiting nonlawyers from charging fees. App. 10a.

REASONS FOR GRANTING THE WRIT

This case presents a question that is fundamental to the implementation of the EAHCA. The Third Circuit has ruled that states may forbid non-lawyers from representing parties in proceedings under EAHCA. Based on that ruling, the Court found that New Jersey's no-fee rule, which it viewed as less draconian that an outright ban on lay advocates, is also permissible.

Review by this Court is warranted because the Third Circuit's ruling, if allowed to stand, will deal a harsh blow to the effective implementation of EAHCA, which reaches over 4.3 million children.[2] Congress passed EAHCA because it was well "aware that schools had too often denied such [handicapped] children appropriate educations without in any way consulting their parents." *Honig v. Doe*, 108 S. Ct. 592, 598 (1988). EAHCA guarantees parents a right of full participation in determining their child's educational and developmental future. But the rights conferred by EAHCA are not self-executing; they can be enforced only through the Act's complex procedural

[2]U.S. Department of Education, *Ninth Annual Report to Congress on the Implementation of the Education of the Handicapped Act*, 2 (1987)(hereinafter "*Ninth Annual Report to Congress*").

system that is quite difficult for most parents to utilize, and pits parents against school authorities that are generally represented by counsel.

The ruling below will make it virtually impossible for parents of handicapped children who are unable to afford an attorney to secure the assistance of an advocate with expertise in the field of special education. As a result, most parents will be compelled to hire a lawyer or proceed through EAHCA's elaborate procedural maze without help — a result that turns Congress' intent in the Act upside down. In view of the magnitude of the stakes in every EAHCA proceeding for the children, their parents, and the schools, the Third Circuit's ruling will inevitably have a profoundly harmful impact on the effective implementation the EAHCA. Accordingly, this Court should grant review.

1. The cornerstone of this petition and the ruling below is the proper interpretation of 42 U.S.C. § 1415(d)(1), which provides that any party to a hearing under EAHCA "shall be accorded . . . the right to be accompanied and advised by counsel and by individuals with special knowledge and training with respect to the problems of handicapped children." The court of appeals concluded that the "carefully drawn statutory language [of EAHCA] does not authorize these specially qualified individuals to render legal services." App. 7a. The court found that because the statute does not expressly provide that such persons may "represent" parties, but only that a party "may be *accompanied and advised* by counsel and by individuals with special knowledge or training," Congress must have intended that specially trained non-lawyers would play only a consultative role in EAHCA proceedings. App. 7a-8a (emphasis in original).

Review by this Court is needed because this construction will jeopardize, if not eliminate, the availability of lay advocates

in EAHCA proceedings. At present, parents have a choice between attorney and lay representation. If the Third Circuit's ruling stands, however, parents of disabled children will be confronted with precisely the choice that Congress sought to avoid in EAHCA — *i.e.*, being forced either to handle the hearing *pro se* or to hire a lawyer. Thus, parents who believe, for example, that their child is about to be transferred to an inappropriate facility, denied a special education course, or deprived of an educational opportunity, either have to challenge the school authorities alone or absorb the considerable expense of retaining an attorney.[3]

That choice will be a daunting one. The issues raised in EAHCA hearings are highly complex, both substantively and procedurally. According to the U.S. Department of Education, "[i]n numerous studies, parents and school officials . . . report that legal or advocate representation is essential for both sides because of the technical nature of the hearing proceedings, the need to clearly organize and present each side, especially in cases where the issues are complicated, and to equalize the perceived imbalance between parents and schools in the hearing process." *Ninth Annual Report to Congress*, at 77. Among other things, an effective advocate must have expertise in the diagnosis, evaluation, and classification of both physical and developmental disorders, know what sort of services are being offered by the local educational agency, and be cognizant of what alternatives are available elsewhere. *See* Note, *Enforcing the Right to "Appropriate" Education: The*

[3]Under the Handicapped Children's Protection Act of 1986, Pub. L. 99-373, 100 Stat. 796, parents may recover attorneys' fees from the state where they successfully challenge an adverse administrative ruling in court. However, the fee provision appears to exclude time spent at the administrative level and would certainly not provide fees where there was no need to go to court. Thus, the fee provision will have little, if any, impact on the availability of lawyers at the administrative stage.

Education for All Handicapped Children Act of 1975, 92 Harv. L. Rev. 1103, 1111-13 (1979) (hereinafter "Harvard Note"); Clune & Van Pelt, *A Political Method of Evaluating the Education for All Handicapped Children Act of 1975*, 48 Law & Contemp. Prob. 9, 35-36 & nn.169-171 (1985) (hereinafter "Clune & Van Pelt"). With a child's future hanging in the balance, the stakes for parents are enormous. Those with the financial resources to hire an attorney are likely to do so. But even this is not necessarily an attractive option, since few attorneys have any expertise in these matters. Thus, if given a choice, even an affluent parent might opt for a lay advocate who is in fact an expert in the problems faced by disabled children. *Cf.* Harvard Note, *supra*, 92 Harv. L. Rev. at 1112 n.56. Because of the importance of this issue to all parents of the 4.3 million handicapped children affected by EAHCA, this Court should grant review.

Review is also warranted because the Third Circuit seriously misconstrued the Act and overlooked its underlying legislative purpose. To begin with, the court's interpretation, which allows lay advocates to provide only informal advice, robs the very language the court construed of any meaning. There can be no doubt that, even in the absence of this statute, parents had an absolute right to have experts accompany them at hearings and provide advice off-the-record. But to conclude, as did the court below, that the grant of authority to "individuals with special knowledge or training" is to duplicate rights that parents already had is to suggest that the language is pure surplusage. Moreover, the interpretation of the court below is at odds with New Jersey's decade-long construction of the Act; New Jersey has allowed petitioner to represent parents in EAHCA hearings for eleven years only because it believed that it was compelled to do so under section 1415(d)(1). *See* N.J. Rule 1:21-1(e)(1)(allowing lay representation only

"[w]here *required* by federal statute or regulation.")(emphasis added).[4]

The flaws in the ruling below become even more apparent when examined in light of Congress' intent in EAHCA. Both the text of section 1415 and its legislative history demonstrate that one of Congress' principal concerns was to give parents a greater voice in determining the educational future of their children. *See Honig, supra*, 108 S. Ct. at 598. The Senate Report stressed the need to establish an informal dispute resolution system that would ensure that parents could air their disputes quickly and without having to incur the burden and expense of litigation. "It should not . . . be necessary for parents throughout the country to continue utilizing the courts to assure themselves a remedy." S. Rep. No. 94-168, 94th Cong., 1st Sess. 9 (1975). The House Report echoed these concerns and specifically proposed to allow lay representatives — non-lawyers trained and skilled in the technical problems involved in evaluating handicapped children — to assist parents in EAHCA hearings as a means of giving parents the broadest range of options in choosing representation. H.R. Rep. No. 94-332, 94th Cong., 1st Sess. 32 (1975). This proposal was incorporated into the final bill. H.R. Conf. Rep. No. 94-664, 94th Cong., 1st Sess. 49-50 (1975).

As this history makes clear, the decision below frustrates Congress' intent. For parents who cannot afford to hire a lawyer, the ruling below extinguishes any realistic hope of assistance. Commentators who have studied this issue have uniformly concluded that, in part because of the unavailability of affordable counsel, poorer parents seldom take advantage

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[4]New Jersey is not alone in allowing lay representation in EAHCA proceedings. According to the Department of Education, lay representation in EAHCA hearings is now commonplace. *See Ninth Annual Report to Congress*, 77.

of the procedural protections in the Act, and thus remain at the mercy of the local school authorities — precisely the result Congress sought to avoid.[5] The ruling below, if sustained, will close the door on any realistic hope of ameloriating this problem, and indeed, will make matters even worse.

2. Review is also warranted to resolve the closely related question of whether lay advocates representing clients at hearings under EAHCA may charge their clients fees. In petitioner's view, New Jersey's refusal to allow lay advocates to charge fees is flatly at odds with the goals of EAHCA. Hence, the no-fee rule is preempted by EAHCA, and violates the Equal Protection Clause of the Fourteenth Amendment. The Court should grant review to consider these claims.

(a). The court of appeals never took issue with petitioner's basic proposition that the right to charge a fee is an integral part of the right to represent a client in EAHCA hearings and that any state law forbidding fees would be preempted under cases such as *Sperry v. The State of Florida ex rel. The Florida Bar*, 373 U.S. 379 (1963). Instead, the court found that the EAHCA conferred no right on petitioner to provide legal representation to her clients, and hence there was no preemption insofar as petitioner was seeking fees for legal representation. Indeed, the court assumed that petitioner was entitled to charge fees with regard to her consultative role, which the court found was authorized by EAHCA, and that any state court forbidding compensation for activities authorized by EAHCA would be preempted.

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[5]*See generally* Harvard Note, *supra*, at 1111; Clune & Van Pelt, *supra*, 48 Law & Contemp. Prob. at 35-36; Note, *Legal Remedies for the Misclassification or Wrongful Placement of Educationally Handicapped Children*, 14 Colum. J. Law & Soc. Prob. 389, 418-19 & n.154 (1979); Neal & Kirp, *The Allure of Legalization Reconsidered: The Case of Special Education*, 48 Law & Contemp. Prob. 75, 78-79 (1985). *See also Lora v. Board of Education*, 456 F. Supp. 1211, 1252-56 (E.D.N.Y. 1978).

But if petitioner is correct that the Act authorizes her to represent her clients in EAHCA hearings — not just give them advice — then review is required because the New Jersey rule is directly at odds with *Sperry*. There, the Florida Bar sought to enjoin Mr. Sperry, a non-lawyer, from representing Florida clients for a fee before the United States Patent Office on the theory that Mr. Sperry's conduct constituted the unauthorized practice of law. This Court unanimously rejected that theory, emphasizing that " 'the law of the State, though enacted in the exercise of powers not controverted, must yield' when incompatible with federal legislation." *Id.* at 384, *quoting Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 211 (1824). The Court then noted that:

> If the authorization [to participate as a lay advocate] is unqualified, then, by virtue of the Supremacy Clause, Florida may not deny to those failing to meet its own qualifications the right to perform the functions within the scope of the federal authority. A State may not . . . impose upon the performance of activity sanctioned by federal licence additional conditions not contemplated by Congress.

Id. at 385 (footnotes and citations omitted).

Under this rationale, New Jersey's no-fee rule cannot be applied to lay advocates in EAHCA proceedings. There is no hint anywhere in EAHCA or its legislative history that Congress intended the authorization for lay advocates to be limited only to those who would provide their services free of charge. To the contrary, Congress directed that the states permit lay advocates in order to encourage the use of individuals, who, by virtue of their specialized training and knowledge, could effectively represent parents even though they are not members of the bar. By relegating these individuals to perpetual "amateur" or "pro bono" status, New Jersey's

no-fee rule discourages lay advocates from handling EAHCA cases, thus subverting a basic goal of EAHCA. And by imposing "conditions not contemplated by Congress," namely the condition that lay advocates renounce fees, New Jersey has overstepped the boundaries strictly drawn by the Supremacy Clause.

(b). As with the preemption argument, the Third Circuit never confronted head-on petitioner's Equal Protection challenge. Rather, the court reasoned that because, in its view, New Jersey was not required to allow lay advocates to represent parents in EAHCA hearings, it could properly take the less intrusive step of forbidding compensation. However, if the Court agrees with petitioner that the Third Circuit's interpretation of EAHCA is incorrect, then the court's rationale for upholding the rule on Equal Protection grounds falls away as well. Thus, if the Court grants review, it should also examine the Equal Protection question.

The Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). Here, there is no question that New Jersey's no-fee rule discriminates against lay advocates. Under New Jersey Rule 1.211(e)(1), both lawyers and lay advocates may provide legal representation to any parent who wishes to retain them at EAHCA hearings, but only lawyers may charge fees. Thus, the question is whether prohibiting lay advocates, who are already permitted to represent clients, from accepting a fee for their services, has a rational basis.

In the courts below, New Jersey defended its rule on two basic grounds: that it was needed to discourage the proliferation of lay advocates and to prevent confusion between licensed attorneys and unlicensed lay advocates. However, if petitioner is correct that one of EAHCA's goals is to afford parents a

choice between lawyer and lay representation, then New Jersey's goal of discouraging lay advocates from participating in EAHCA hearings is plainly not a legitimate state interest. New Jersey's "confusion" argument is similarly strained, since the no-fee rule achieves little more than simply stigmatizing non-lawyers handling EAHCA proceedings. In any event, the argument ignores the fact that New Jersey already has a strong law, backed-up by criminal penalties, against nonlawyers holding themselves out as attorneys, which eliminates any potential confusion. N.J.S.A. 2A:170-78. As is evident, New Jersey's justifications for the no-fee rule, which survived the rational basis test only because of the Third Circuit's erroneous interpretation of the role of non-lawyer experts under EAHCA, become untenable when analyzed under the proper construction of the Act. Thus, if the Court grants review, it should also address petitioner's Equal Protection claim.

CONCLUSION

For the reasons stated above, the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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August 12, 1988

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 87-52781

MARILYN ARONS,

Appellant

v.

NEW JERSEY STATE BOARD OF EDUCATION, RONALD I. PARKER, ACTING DIRECTOR OF THE OFFICE OF ADMINISTRATIVE LAW, SAUL COOPERMAN, COMMISSIONER OF EDUCATION, JEFFREY OSOWSKI, DIRECTOR OF SPECIAL EDUCATION, NEW JERSEY DEPARTMENT OF EDUCATION,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
(D.C. Civil No. 85-0209)

Argued December 3, 1987

Before: WEIS, HIGGINBOTHAM, and ROSENN, Circuit Judges

Filed March 16, 1988

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OPINION OF THE COURT

WEIS, Circuit Judge.

Plaintiff has substantial expertise in the education of handicapped children. Regulations of the State of New Jersey permit her to act as a lay advocate on behalf of parents of handicapped children in administrative hearings to determine the children's appropriate educational placement. The same regulations, however, prohibit her from receiving fees for legal representation in those proceedings. The district court rejected her challenge to that provision and granted judgment for defendants. We will affirm.

In 1985, plaintiff brought suit *pro se* alleging "educational malpractice" against the New Jersey State Board of Education, the New Jersey Department of Education, the Office of Administrative Law, and several state education officials. She

added counts asserting libel, misappropriation of her name, tortious interference with her grant applications, as well as a claim seeking compensation for her work as a lay advocate representing parents of handicapped children. The court entered judgment for all defendants on varying grounds. Only the plaintiff's claim for compensation has been appealed.

The mother of two handicapped children, plaintiff has played an active role in New Jersey special education issues since 1976. As a professional educator, she specializes in curriculum development for exceptional children. As a lay advocate, she acts on behalf of parents of handicapped children at administrative hearings conducted by the New Jersey Office of Administrative Law in compliance with the Education for All Handicapped Children Act, 20 U.S.C. §§ 1401-1420 (1976 & 1987 Supp.)

The Act prescribes due process hearings at which parents may contest the appropriateness of the education their handicapped children are receiving. Although the parents may proceed *pro se*, the Act gives the "right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children . . ." 20 U.S.C. § 1415(d)(1).

Plaintiff is not a lawyer; therefore, she participates in these hearings as an "individual[] with special knowledge or training." Her performance as a lay advocate is authorized and limited by regulations adopted by the New Jersey Office of Administrative Law, which provides that:

> "(a) At a hearing any party may be accompanied and advised by legal counsel or by individuals with special knowledge or training with respect to handicapped pupils and their educational needs, or both

> "(b) A non-lawyer seeking to represent a party shall comply with the application process ... and shall be bound by the approval procedures, limitations and practice requirements contained [therein] . . . ."

N.J. Admin. Code 1:64-a4.2. According to section 4.2(b)(4) of that provision, nonlawyers may not receive a fee for representing a party in administrative proceedings.

In the original complaint, plaintiff sought compensation from the state for her services as a lay advocate at various hearings. In the amended complaint, however, she requested permission to charge the parents fees for her services as would an attorney. She noted that she has spent more than $6,000 per year of her own money to pay expenses incurred in the course of her representation activities. In particular, plaintiff itemized costs of transportation, telephone, heat, and light as well as charges for the purchase of legal materials and research supplies. She argues that she has "done work equal to that of an attorney within the State of New Jersey yet is denied equal pay for that equal work because she is not a member of the New Jersey Bar Association or a graduate of a law school."

The district court acknowledged the plaintiff's considerable efforts as a lay advocate and recognized that she "undoubtedly performs an invaluable service." Nevertheless, the district court held that the Act did not create a right to compensation for lay advocates who are functioning as lawyers by offering and cross-examining witnesses or writing briefs. The New Jersey rule allowing compensation to lawyers but excluding it from lay advocates, in the district court's view, is not arbitrary; rather, the rule furthers the state's legitimate interest in regulating the practice of law by nonlawyers.

The district court also pointed out that the prohibition against receiving fees for legal services in no way interferes with the

plaintiff's right to be paid for her educational expertise in assisting handicapped pupils. She is free to charge as an expert witness or as an educational consultant for time spent in preparing for and appearing at the hearings. As the court observed, the rule only bars "compensation for services for which she has no recognized expertise or training — in the provision of legal services."

On appeal, plaintiff contends first that the Act preempts the New Jersey no-fee provision and second that the state rule violates the Equal Protection Clause. Defendants argue that because Congress did not demonstrate a clear and unambiguous intent to displace state law when it enacted the grant-in-aid provisions of the Act, the New Jersey rule must be enforced.

A.

The Education for All Handicapped Children Act of 1975 is a comprehensive scheme designed by Congress to help the states comply with their constitutional obligation to provide public education for handicapped children. *Smith v. Robinson* 468 U.S. 992, 1009 (1984). The statute conditions federal financial assistance upon a state's compliance with the substantive and the procedural goals of the Act. *Honig v. Doe*, ____ U.S.____, 108 S. Ct. 592 (1988).

The statute's procedural provisions encourage parents to participate in planning a free appropriate educational program for their children, and a comprehensive system of administrative and judicial safeguards facilitates review of decisions that the parents contest. *Id.* at ____, 108 S. Ct. at 606. Not only does the Act provide for mandatory administrative hearings, but it gives parents the right to advice and consultation with educational experts. 20 U.S.C. § 1415(d)(1).

Plaintiff contends that New Jersey's prohibition against fees cannot stand because of federal preemption. The standard governing federal preemption of state statutes and regulations most often is based on a clear or unambiguous expression of congressional intent. If Congress demonstrates an intent to occupy a given field, any state law falling within that field is preempted. If Congress, however, does not entirely displace state regulation over the matter, state law is still preempted to the extent it actually conflicts with the federal law or stands as an obstacle to achieving the full purposes and objectives of Congress. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

In this case, plaintiff does not argue that Congress sought to occupy the field completely or that the state rule conflicts literally with the federal statute. Instead, she says that the "no fee rule is preempted because it thwarts the achievement of the goals Congress set in the statute." Essentially, her position is that the Act "confers on parents the right to be represented by a lay advocate," and so Congress must have intended for advocates to charge fees in order to encourage the continued use of such services.

As support for this theory, plaintiff cites *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379 (1963). There, the Florida Bar challenged the right of a lay person to represent clients before the Patent Office. The Supreme Court rejected the challenge on the ground that Congress had empowered the Commissioner of Patents to prescribe regulations governing the practice by "agents, attorneys, or other persons representing applicants or other parties before the Patent Office." *Id.* at 384 (emphasis omitted). Pursuant to that statutory authorization, the Commissioner had established two separate registers of persons entitled to represent applicants seeking patents. One register consisted of names of attorneys: the other listed nonlawyer "agents." *Id.*

In *Sperry*, the Supreme Court called attention to the long history of practice by nonlawyer agents before the Patent Office and noted the extended congressional debate over the matter. Because patents confer federal rights, the Court concluded it could not ignore the potentially disruptive impact on patent office practice which might occur if nonlawyers were barred from appearing. Such a ban could force lay practitioners to relocate, apply for admission to the state bar or even discontinue practice. *Id.* at 401. Consequently, the states were not permitted to prohibit nonlawyers from performing services for patent applicants within the state.

Sperry, however, is readily distinguishable. First, unlike *Sperry*, the Office of Administrative Law here is a state, not a federal, agency. Second, there is no time-honored tradition of practice by nonlawyers before this state entity; nor did Congress extensively debate the issue. Third, the statute in *Sperry* referred to persons "representing applicants". Here, in contrast, the Act states only that a party "may be *accompanied and advised* by counsel and by individuals with special knowledge or training." 20 U.S.C. § 1415(d)(1) (emphasis added).

The carefully drawn statutory language does not authorize these specially qualified individuals to render legal services. Although the Act does give "[a]ny party to any hearing" the right to "present evidence and confront, cross-examine, and compel the attendance of witnesses," *Id.* § 1415(d)(2), those functions are not designated to be performed by law advocates. Furthermore, the statute does not use the word "represent" in subsection (d)(1), as would be expected if Congress intended to place expert and legal counsel on the same footing.

Our search through the legislative history has failed to uncover any indication that Congress contemplated that the "individuals with special knowledge" would act in a

representative capacity. The Senate Report describes the "individual['s] "role as one of consultation, with emphasis on the responsibility to identify educational problems, evaluate them, and determine proper educational placement. S. Rep. No. 168, 94th Cong. 1st Sess., *reprinted in* 1975 U.S. Code Cong. & Admin. News 1470-71.

The provisions's text and history thus cast substantial doubt on the plaintiff's statement in her brief that "Congress intended that no distinction be drawn between lawyers and lay advocates." The amendments adopted in 1986 which permit a prevailing party to recover attorney's fees apply not only at the judicial level but also at the administrative stage.[1] Significantly, those amendments contain no provision granting fees for representation by lay advocates. The Conference Committee Report explains "[t]he conferees intend that the term 'attorneys fees as part of the costs' includes reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation . . . necessary for the preparation of the parent or guardian's case . . .." H.R. Conf. Rep. No. 687, 99th Cong. 1st Sess. (1986).

That is not to say that plaintiff here may not perform traditional representation functions during administrative hearings. New Jersey Office of Administrative Law regulations authorize her to do so. As presently drawn, however, those regulations do not allow her to collect a fee for such services. We emphasize, as did the district court, that nothing prevents her from receiving compensation for work done as an expert

[1]For a discussion of the attorney fees provision, *see Winnick, Congress, Smith v. Robinson, and the Myth of Attorney Representation in Special Education Hearings: Is Attorney Representation Desirable*, 37 Syracuse L.Rev. 1161 (1987); Notes, *Education Law — The Handicapped Children's Protection Act of 1986: The Award of Attorney Fees in Litigation Under the Education of the Handicapped Act*, 11 S. Ill. U.L.J. 381 (1987).

consultant or witness. Although we appreciate the difficulty of trying to allocate between compensable time spent in consultation and noncompensable time spent in legal representation, the task is not insurmountable. The receipt of consultation fees should eliminate the financial losses Arons claims to have sustained in the course of providing assistance to parents of handicapped children.

The highly specific language of the Act has led the Supreme Court to read the statutory provisions narrowly. Thus, in *Smith v. Robinson*, the Court refused to read into the pre1986 wording of the Act a grant of attorney's fees, 468 U.S. at 1014. In *Honig*, the Court declined to "re-write the statute" by adding an emergency exception for dangerous students. 108 S. Ct. at 604. *See also Board of Educ. of Hendrick Hudson Cent. School Dist. v. Rowley*, 458 U.S. 176 (1982).

On its face, the Act is silent about any right of "individuals with special knowledge" to charge fees for legal representation. It is unlikely this omission was inadvertent because the states historically have exercised strict control over the professional conduct of attorneys. *See Middlesex County Ethics Comm. v. Garden State Bar Ass'n.* 457 U.S. 423 (1982). As the Supreme Court recognized, "the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions," *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975).

In the absence of explicit provisions, we are not convinced that Congress intended to limit the states' traditional control over the practice of law. Nothing in the statutory language demonstrates a congressional desire to supersede the states'

authority to regulate the legal profession. We, too, decline to "rewrite the statute."

The New Jersey no-fee rule will not frustrate the Act's purpose of providing parents with expert assistance in navigating the administrative process. As we have noted, nothing hinders plaintiff from charging for her expert services in giving testimony, preparing technical reports, consulting with parents, attending hearings, or advising parents about educational decisions.

B.

We do not find merit in the plaintiff's Equal Protection challenge to the New Jersey rule. She contends that because she is a nonlawyer, she is unfairly prevented from receiving a fee for acting as an advocate — although a lawyer may charge for identical services. Plaintiff concedes, however, that the rational relationship test applies in these circumstances. *See Edelstein v. Wilentz*, 812 F.2d 128, 132 (3d Cir. 1987).

The district court reasoned that since New Jersey could ban the practice of law altogether by unlicensed persons, the state could impose restrictions on lay practitioners. *See Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) (having chosen to legalize gambling, Puerto Rico not barred from taking less intrusive steps to restrict advertising). The more rigorous standards of legal training, including ethical and fiduciary restraints, contrasted with the less stringent requirements expected from lay representatives also were significant factors in the court's consideration. The district court expressed concern that permitting lay advocates to charge for their representation services would encourage the proliferation of unlicensed practice to the public detriment. Accordingly, the court found that the New Jersey rule met the rational relationship test.

We find no error in the district court's disposition of the Equal Protection claim. Plaintiff has not shown that the New Jersey rule is irrational and unrelated to legitimate state concerns.

Plaintiff has failed to persuade us that, as a lay advocate, she is entitled to charge fees for services that constitute the practice of law. The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 87-5278

MARILYN ARONS,

Appellant

v.

NEW JERSEY STATE BOARD OF EDUCATION, RONALD I. PARKER, ACTING DIRECTOR OF THE OFFICE OF ADMINISTRATIVE LAW, SAUL COOPERMAN, COMMISSIONER OF EDUCATION, JEFFREY OSOWSKI, DIRECTOR OF SPECIAL EDUCATION, NEW JERSEY DEPARTMENT OF EDUCATION,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. Civil No. 85-0209)

Present: WEIS, HIGGINBOTHAM and ROSENN, *Circuit Judges*

J U D G M E N T

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel December 3, 1987.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered April 27, 1987, be and the same is hereby affirmed. Costs taxed against the appellant.

ATTEST:
/s/ Sally Mrvos
Clerk

March 16, 1988 — Costs taxed in favor of appellees as follows: BRIEF *$227.00*

Certified as a true copy and issued in lieu of a formal mandate on April 7, 1988.

Test: /s/ M. Elizabeth Ferguson

Chief Deputy Clerk, United States Court of Appeals, for the Third Circuit

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL ACTION No. 85-209

MARILYN ARONS,

Plaintiff,

v.

NEW JERSEY STATE BOARD OF EDUCATION, *et als.*

Defendants

ORDER

This matter having been opened to the court upon application of the defendants, New Jersey State Board of Education, *et. al.*, seeking dismissal of *pro se* plaintiff Marilyn Arons' state law claims against Ronald Parker, Acting Director of the Office of Administrative Law; Saul Cooperman, Commissioner of Education; and Jeffrey Osowski, Director of Special Education; and for summary judgment dismissing plaintiff's remaining federal claims, and this court having heard oral argument on the motion and having considered the parties' submissions and for good cause showing, and for the reasons to be set forth in an Opinion to be filed hereafter.

IT IS this 27th day of April, 1987 hereby

ORDERED that defendants' motions are granted, and it is further

ORDERED that plaintiff's state law claims against defendants Ronald Parker, Acting Director of the Office of Administrative Law; Saul Cooperman, Commissioner of Education; and Jeffrey Osowski, Director of Special Education; are dismissed, and it is further

ORDERED that plaintiff's remaining federal claims seeking entitlement to receive compensation as a lay advocate are dismissed, and it is further

ORDERED that plaintiff's amended complaint is hereby dismissed in its entirety.

/s/ _____
H. LEE SAROKIN, U.S.D.J.

Copies to:

Ms. Marilyn Arons
210 Teaneck Terrace
Teaneck, New Jersey 07666

Ms. Andrea Silkowitz
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Attorney for Defendants

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 85-209

MARILYN ARONS,

Plaintiff,

v.

NEW JERSEY STATE BOARD OF EDUCATION, *et. al.*
Defendants.

OPINION

SAROKIN, District Judge

Defendants, New Jersey State Board of Education and the individually named state education officials, move before this court seeking to dismiss plaintiff's state law tort claims, and for summary judgment on the question of whether lay advocates are entitled to compensation for services performed in accordance with the Education of All Handicapped Children Act, 20 U.S.C. § 1401, *et. seq.* For the reasons set forth below, this court grants defendants' motions and dismisses plaintiff's amended complaint.

BACKGROUND

Plaintiff, Marilyn Arons, filed suit in this court, *pro se*, seeking to vindicate various wrongs she perceived in the administration of New Jersey's Special Education Program. Ms. Arons is the mother of two handicapped children and has been active in special education issues in New Jersey since 1976. She has been a professional educator since 1961, specializing in curriculum development for exceptional children.

In 1977, Ms. Arons founded the Teaneck Parent Information Center, Inc., an advocacy group which provides information and advice concerning special education opportunities to parents of handicapped children. Working through the Center, Ms. Arons has served as a lay advocate representing parents of handicapped children in administrative "due process" hearings before the Office of Administrative Law. Such hearings are required by the Education of All Handicapped Children Act, 20 U.S.C. § 1401, *et. seq.*, prior to placement of a child in special education.

It is undisputed by the defendants that Ms. Arons has represented more handicapped children at these administrative hearings than any other lay advocate in New Jersey. *See* Defendant's Brief in Support of Summary Judgment at 16; *see also* Exhibit A to Affidavit of Nadia Delonas. However, plaintiff receives no compensation for her advocacy efforts. Pursuant to New Jersey Court Rule 1:21-1(e), plaintiff's ability to act as a lay advocate is predicated upon her renouncing compensation.

In filing the underlying complaint, Ms. Arons moves pursuant to 42 U.S.C. § 1983 seeking to establish her entitlement to compensation for advocacy services rendered to handicapped children and their parents. She challenges the constitutionality of the New Jersey Court Rule 1:21-1(e) alleging that it is a violation of the Equal Protection Clause to distinguish between the advocacy efforts of lay advocates and lawyers in representing the handicapped at due process hearings; permitting compensation for the latter but not the former. Plaintiff bases her challenge, in part, on the disputed contention that she is the "sole source of free or low cost legal services" available to parents of the handicapped in New Jersey and therefore deserving of compensation.

Further, plaintiff alleges that the EAHCA, which explicitly contemplates representation by the lay advocates, 20 U.S.C. § 1415(d)(1), and which, as amended by P.L. 99-372 provides for the recovery of attorney's fees where the handicapped child prevails, should be read to permit compensation of lay advocates. More generally, plaintiff's complaint can be read to assert that the compensation of lay advocates, such as herself, is necessary to achieve the EAHCA's purpose, namely promoting the educational interests of handicapped children.

In addition, plaintiff challenges the denial of compensation as violative of the First Amendment and Fourteenth Amendment due process rights of the parents of handicapped children.[2]

Plaintiff argues that the parents' right to be accompanied and advised by a knowledgeable lay advocate as provided for in Section 5(a) of the EAHCA, 20 U.S.C. § 1415(d)(1) is infringed upon by the operation of the New Jersey Court Rule prohibiting compensation to lay advocates. The prohibition on compensating lay advocates may discourage individuals from undertaking lay advocacy and may make it more difficult for parents to secure lay advocate representation.

Finally, plaintiff claims that individual state defendants within the New Jersey Board of Education and the New Jersey Office of Administrative Law have libeled her, wrongfully published her name and address, and interfered with her applications

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[2]By Opinion and Order dated November 5, 1986, this court concluded that plaintiff had standing to assert the rights of parents of handicapped children under the *jus tertii* doctrine. The court based its determination upon a finding that plaintiff, in her advocacy work, has the sort of confidential relationship to the parents of handicapped children contemplated in *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965) and *Eisenstadt v. Baird*, 405 U.S. 438, 444 (1972).

for EAHCA grants on behalf of the Teaneck Parent Information Center.[3]

Defendants now bring these motions seeking to dismiss plaintiff's state law tort claims—namely, libel, misappropriation of one's name and tortious interference with plaintiff's grant applications—for lack of subject matter jurisdiction under F.R.C.P. 12(b)(1) and to compel summary judgment on plaintiff's claim for compensation.

I. *Summary Judgment*

The facts necessary to a determination of plaintiff's claim for compensation are undisputed.

As a condition of its receipt of federal funding provided pursuant to the Education of All Handicapped Children Act, the State of New Jersey is required to comply with an extensive set of goals and procedures. These procedures are designed to facilitate the overriding purpose of the Act to assure that all handicapped children have access to a free, appropriate public education, emphasizing special education tailored to their unique needs and sufficient to confer some

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[2]Plaintiff's original complaint asserted numerous other farreaching allegations of "educational malpractice" by the New Jersey State Board of Education, the New Jersey Department of Education, the New Jersey Office of Administrative Law and various individual state education employees. Plaintiff amended this complaint to include the existing claims for compensation (Amended Complaint, paragraphs 1-8, 11, 15, 17), libel (Amended Complaint paragraph 16), misappropriation of her name and address (Amended Complaint paragraph 12-14), and willful interference with her grant applications (Amended Complaint paragraphs 9, 10).

By Opinion and Order dated November 5, 1985, this court dismissed plaintiff's allegations of "gross, systematic educational malpractice" explaining that plaintiff lacked standing to assert these claims. The court though determined that the amended claims discussed above were properly asserted by Ms. Arons and allowed them to remain in plaintiff's complaint.

educational benefit to them. 20 U.S.C. § 1400(c); *See Bd of Educ of Hendrick Hudson Central School Dist v. Rowley*, 458 U.S. 176, 179 (1982).

Among the procedural safeguards incorporated into the Act, is the opportunity for a parent or guardian of a handicapped child to "present complaints with respect to any matter relating to the identification, evaluation or educational placement of the child, or the provision of a free appropriate public education to such child..." 20 U.S.C. § 1415(b)(1)(E). Whenever a complaint has been presented, the parents or guardian have the opportunity for an impartial "due process hearing", 20 U.S.C. § 1415(b)(2)), conducted before the Office of Administrative Law (OAL). While parents are permitted to appear *pro se*, they are afforded the "right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children..." 20 U.S.C. § 1415(d)(1).[4]

Pursuant to amendments adopted by the Supreme Court of New Jersey, New Jersey Court Rule 1:21-1 (Practice of Law) was revised to permit the appearance of non-attorneys before the OAL "[s]ubject to limitations and procedural rules" promulgated by the OAL. In authorizing these appearances the New Jersey Supreme Court mandated that such representation or assistance could not be undertaken "by any person who receives any fee for such representation". Rule 1:21-1(e). In addition, specific approval must be obtained to assist parents in special education due process hearings pursuant to N.J.A.C. 1:1-3.12. This approval is contingent upon agreement to renounce compensation.[5]

[3]In addition, parents have the right to present evidence and cross-examine witnesses, and the right to receive written findings of fact and decisions. 20 U.S.C. § 1415(d)(2).

[5]N.J.A.C. 1:6A-4.2 provides in pertinent part:

Representation (a) At a hearing, any party may be accompanied and ad-

Plaintiff, Ms. Arons qualifies as a lay advocate pursuant to the above rules and regulations adopted by the Office of Administrative Law, N.J.A.C. 1:1-3.12 and 1:6A-4.2, having obtained approval to assist parents in special education due process hearings based upon her "special knowledge and training" in issues of special education.

Plaintiff does not contend that she is a licensed attorney, (*See* Certification of Marilyn Arons attached to Initial Complaint, paragraph 14), but rather admits that she has never attended law school or participated in any legal studies program. Nevertheless, her efforts on behalf of parents at OAL hearings, appearing as their representative, offering and cross-examining witnesses, and writing briefs, undeniably, constitutes the "practice of law". *See* Defendants' Brief in Support of Summary Judgment at 33; *see also* Plaintiff's Brief in Opposition at 4.

It is undisputed by the defendants that Ms. Arons has represented more handicapped children at these administrative hearings than any other lay advocate in New Jersey. *See* Defendant's Brief in Support of Summary Judgment at 16; *see also* Exhibit A to Affidavit of Nadia Delonas.

However, contrary to Ms. Arons' assertions, the court finds that she is not the "sole source" of free or low cost legal services in the State of New Jersey in the area of special education law. Defendants submit certified OAL records reflecting that a substantial number of parents are represented without cost by the Division of Advocacy for the

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vised by legal counsel or by individuals with special knowledge or training with respect to handicapped pupils and their educational needs, or both.

(b) A non-lawyer seeking to represent a party shall comply with the application process contained in N.J.A.C. 1:1-3.12 and shall be bound by the approval procedure, limitations and practice requirements contained therein.

Developmentally Disabled and the Community Health Project. *See* Exhibit A attached to Mitchell Affidavit; Affidavit of Ronald Parker at ¶ 8 and 9. Moreover, the OAL, in conjunction with the Department of Education has produced and narrated a videotape simulating a due process hearing to assist parents preparing to appear *pro se*. In addition, the Department of Education offers statewide conferences and workshops to provide parents with additional information. *See* Affidavit of Nadia Delonas at ¶ 7, 12-15 and Exhibits B, C, D, E attached; Affidavit of Ronald Parker at ¶ 16.

Plaintiff's bald assertion that she is the sole source of free or low cost legal representation for the parents of the handicapped is insufficient to create a genuine issue of fact in light of the contradictory, documentary evidence provided by the defendants.[6]

Finally, the court notes that in 1985, the EAHCA was amended by *P.L.* 99-372 to provide that "[i]n any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party". Section 2 of the EAHCA. The attorneys' fees provision was enacted to insure that "a

[6]In addition to plaintiff's claim for compensation of her lay advocacy services, plaintiff alleges that she is entitled to receive EAHCA monies since her advocacy organization, the Teaneck Parents Center, is the only information dissemination vehicle in the State and further that the Center provides the only consistent parent training program in the State. Here again plaintiff's bald assertions are insufficient to create a genuine issue of material fact. The court finds no merit to these assertions in light of the representations made by the defendants as to their efforts in training parents and providing them with appropriate information. *See*, infra at 8. Moreover the court notes that as with the claim for compensation for work done before the OAL, the EAHCA does not create any obligation for the state to fund volunteer advocacy organizations serving parents of the handicapped.

parent or legal representative should be free to select and be represented by the attorney of his/her choice". *See* 1986 *U.S. Code Congressional & Administrative News* page 1803. Nowhere however, in the language of Section 2, or in its legislative history, is there any discussion or provision for such fees to be afforded to lay advocates.

DISCUSSION

Defendants argue that plaintiff's compensation claim must be denied as a matter of law. This court agrees that no specific facts have been, or can be alleged, establishing a genuine issue for trial. *Matsushita Elec Indus Co v. Zenith Radio*, 106 S.Ct. 1348, 1356 (1986).

A. *The EAHCA*

Nothing in the language of the EACHA imposes any requirement on the state or creates any rights, either in parents of handicapped children or lay advocates, for monetary compensation of lay advocacy services. Plaintiff attempts to locate an entitlement to compensation in the statute's explicit provision of the right to representation by a knowledgeable lay advocate. Section 5(a) of the EAHCA, 20 U.S.C. § 1415(d)(1). However, the permissive language affording parents the right to representation does not create a simultaneous obligation to compensate the advocate.

Absent any statutory language suggesting, no less imposing, a requirement of compensation of lay advocates by the State, this court may not read such an obligation into the EAHCA provisions. The Supreme Court has explicitly ruled that where Congress seeks to impose conditions on a grant of federal funds—such as compensation for lay advocates—it must speak "with a clear voice". *Pennhurst State School & Hospital v. Halderman*, 51 U.S. 1, 17 (1981). Without such Congressional

mandate, it would be inappropriate for this court to imply an obligation for compensation.

The court is particularly reluctant to imply an obligation to compensate since the funds necessary to satisfy this obligation would divert EAHCA funds from the provision of education services. Concern with restricting the diversion of funds away from the actual education of handicapped children militates against an expansive reading of the EAHCA to provide lay advocate fees. *See e.g. Smith v. Robinson*, 468 U.S. 992 (1984) (omissions of damages remedy and attorneys' fees from the EAHCA as originally enacted reflected "Congress' awareness of the financial burden already imposed on States by the responsibility of providing education for handicapped children").

Nor does the recent amendment of the EAHCA to include an attorneys' fees provision alter the court's analysis. Section 2 of the EAHCA. In granting courts discretion to award reasonable attorneys' fees to prevailing parents, Congress was not granting blanket discretion to compensate lay advocates as well. Discrepancies in training, legal experience and professional accountability have led other courts to conclude that "attorneys' fees" provisions are properly limited to the compensation of licensed attorneys. *See Peniman v. Cartwright*, 550 F. Supp. 1302 (S.D. Iowa 1982) (policies underlying the Civil Rights Attorneys' Fees Award Act, 42 U.S.C. § 1988, would not support the award of attorneys' fees to "jailhouse lawyers"); *Grooms v. Snyder*, 474 F. Supp. 380 (N.D. Ind. 1979).[7] Moreover, given Congressional recognition

[7]The legislative history of Section 2 explains that the attorneys' fees provision is to be interpreted consistently with 42 U.S.C. § 1988. *See* 1986 *U.S. Code Congressional & Administrative News*, pages 1803-1804. As noted by defendants, the Third Circuit has declined to construe § 1988 as authorizing an award of attorneys fees to non-lawyer *pro se* litigants. *See Cunningham v. F.B.I.*, 664 F.2d 383 (3d Cir. 1981); *Pitts v. Vaughn*,

of lay advocate representation, 20 U.S.C. § 1415(d)(1), the failure to provide for lay advocate compensation in addition to the attorneys' fees provision strongly suggest an intentional omission.

The court is very sympathetic to plaintiff's plight. Plaintiff has expended considerable effort in the representation of parents of handicapped children and undoubtedly performs an invaluable service. However, plaintiff asks this court to interpret the EAHCA to require compensation, where no statutory authority for such an interpretation exists. The court may not usurp the legislative function in this manner. Rather, the authority to create an entitlement to compensation for lay advocates under the EAHCA rests with the Congress and not this court.

It is often difficult for non-attorneys to understand and appreciate the limits of law. Though this court may feel strongly that the services performed by plaintiff are deserving of recognition and financial recompense, the court may not read its preferences into the law.

The court notes however that nothing in the EAHCA prevents the state of New Jersey from amending its own regulations to compensate lay advocates. The absence of a statutorily mandated obligation in no way interferes with the state's authority to voluntarily assume this responsibility.

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679 F.2d 311 (3d Cir. 1982). In part, the Third Circuit has reasoned that self-representation does not supply the objectivity and detachment that an outside attorney can provide as a check against groundless or unnecessary litigation, and further that non-lawyers are not as adept at facilitating the litigation as lawyers. These same factors are implicated in this case.

In light of the legislative history and this court's understanding of the Third Circuit's rationale, the court concludes that Congress' purpose in enacting Section 2 of the EAHCA was not to extend the meaning of "attorneys' fees" to the compensation of lay advocates.

B. *The Equal Protection Clause*

Having determined that the EAHCA does not require the state of New Jersey to compensate plaintiff for her advocacy efforts, it remains for this court to determine whether the operation of New Jersey Court Rule 1:21-1(e), precluding compensation for nonattorneys appearing before the OAL is otherwise violative of plaintiff's constitutional rights.

Plaintiff challenges the operation of Rule 1:21-1(e) alleging that the denial of compensation to non-attorneys whose services constitute the practice of law is a violation of the Equal Protection Clause. This court cannot agree.

First, the authority to regulate the practice of law is a matter of exclusive state law jurisdiction and control subject only to the requirement that the state not exercise its power in an arbitrary manner. *Leis v. Flynt*, 439 U.S. 438, 442 (1979). The Supreme Court has repeatedly recognized that states have an "extremely important interest" in the regulation and licensing of attorneys practicing in their courts and administrative forums. *See Middlesex Ethics Comm. v. Garden State Bar Assoc.*, 457 U.S. 423, 434 (1982); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975). Accordingly, so long as the state's regulation is "rationally related to a legitimate state interest", *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976), it will not be disturbed.[8]

[8]Examples of cases where the Supreme Court has upheld the constitutionality of a state regulation despite "incidental individual inequality" include *Leis v. Flynt*, 439 U.S. 438 (1979) (upholding denial of *pro hac vice* admission absent a particularized showing of necessity for representation) and *Martin v. Davis*, 187 Kan. 473 (S. Ct. 1960) app. dis. *sub nom Martin v. Walton*, 368 U.S. 25 (1961) (affirming legality of a Kansas statute precluding attorneys admitted to the Kansas bar but also admitted and regularly engaged in the practice of law in another state from being allowed to practice before Kansas courts and administrative agencies without the association of a Kansas lawyer).

In this case, where it is undisputed that plaintiff's lay advocacy efforts constitute the practice of law, the Supreme Court of New Jersey, as regulator of the bar in the state, enjoys exclusive authority for establishing the conditions under which plaintiff may appear before the OAL.

Defendants properly note that the Supreme Court of New Jersey could have chosen to ban any practice of law by persons unlicensed by the court. However in 1983, based on the recommendations of its Civil Practice Committee and the Office of Administrative Law, the court determined that in certain limited circumstances and with oversight by the OAL the public interest would be served by allowing non-attorneys to appear in contested cases before the OAL. Having made the decision to allow limited appearances by lay advocates, the court is not foreclosed from imposing restrictions upon such non-attorney appearances. *See Posada de Puerto Rico Assoc. v. Tourism Co.*, 106 S. Ct. 2968 (1986) (having chosen to legalize casino gambling for its residents, Puerto Rico is not barred by the First Amendment from taking less intrusive steps of reducing the demand through restrictions in advertising).

In exercising its discretion to prohibit compensation of non-attorneys appearing before the OAL, the Supreme Court did not act arbitrarily. While lay advocates with expertise in a subject area may effectively represent clients and "practice law" on their behalf, they are not bound by the same ethical and fiduciary restraints imposed upon the bar, nor have they qualified through extensive training to hold themselves out as "expert" in the provision of legal assistance. On this basis the Supreme Court reasonably and permissibly drew a distinction between attorneys and non-attorneys for compensation purposes. *See Peniman v. Cartwright*, 550 F. Supp. 1302 (S.D. Iowa); *Grooms v. Snyder*, 474 F. Supp. 380 (N.D. Ind. 1979). The Supreme Court's no compensation rule is rationally related

to the legitimate state interest in preserving the distinction between the licensed practice of law and the untrained assistance of lay advocates. Absent such a distinction the state might legitimately fear the creation of a "cottage industry" of lay advocates holding themselves out to clients as "legal experts" absent the rigorous training and ethical rules which otherwise govern an attorney's conduct. The professional accountability associated with the practice of law is lacking when the "legal" representatives are unlicensed lay advocates.

By this analysis, the court in no way suggests that plaintiff is less qualified to represent parents of the handicapped at due process hearings than a licensed attorney. On the contrary, plaintiff's experience no doubt renders her uniquely qualified in this specialized area of law. However the issue before the court is whether the New Jersey Supreme Court's decision to bar compensation of lay advocates rises to the level of an Equal Protection violation. Finding that the prohibition is rationally related to the legitimate state interest in strictly regulating the practice of law by non-attorneys and maintaining the distinction between the licensed practice of law and assistance by a lay advocate, the court concludes that no equal protection violation exists.

Furthermore, in evaluating plaintiff's claim the court notes that Rule 1:21-1(e) only prohibits plaintiff from receiving compensation for the provision of legal services. Rule 1:21-1(e) in no way interferes with plaintiff's ability to be compensated for application of her educational expertise to the service of handicapped children. For example, were plaintiff to testify as an expert witness in the field of special education, or work as an educational consultant in preparing parents for their due process hearings, these services would be compensable. All that is barred by Rule 1:21-1(e) is plaintiff's ability to seek

compensation for services for which she has no recognized expertise or training—in the provision of legal services.

C. *The First Amendment Claim*

Similarly, the court concludes that plaintiff has failed to establish a First Amendment violation. Nothing in New Jersey Court Rule 1:21-1(e) deprives plaintiff of her ability to appear before the OAL and effectively represent parents of handicapped children. Having granted plaintiff the opportunity to provide lay advocacy services the state is not entitled to arbitrarily interfere with the exercise of that freedom, but at the same time the state is under no obligation to finance its exercise. *See Harris v. McRae*, 448 U.S. 297, 317-8 (1980) ("Although the liberty protected by the Due Process Clause affording protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom"). The failure of the State to provide funding to support the exercise of lay advocacy does not constitute an impermissible infringement of the First Amendment interest. Moreover, in view of the compelling interest the state has in regulating the practice of law, this court finds that the "significant government interest[ ] favor[s] the limitation on 'speech'" that plaintiff challenges. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

D. *The Derivative Claims*

Finally, plaintiff alleges that the prohibition against compensating lay advocates impermissibly infringes upon the First Amendment and Fourteenth Amendment due process rights of the parents of handicapped children. Plaintiff argues that the prohibition on compensation discourages lay advocacy and thus eliminates the opportunity for effective lay advocate

representation contemplated by Section 5(a) of the EAHCA, 20 U.S.C. § 1415(d)(1). By operating to preclude effective representation, Rule 1:21-1(e) allegedly deprives parents of their property interest in the continued receipt of an appropriate special education for their children without due process of law.

The court begins its analysis by noting that due process is a "flexible concept"—the processes required by the Fourteenth Amendment vary depending on the importance attached to the interest and the particular circumstances under which the deprivation may occur. *Mathews v. Eldridge*, 424 U.S. 319 (1976). In defining the process necessary to ensure "fundamental fairness", the Supreme Court has held that the due process clause does not require that "the procedures used to guard against an erroneous deprivation...be so comprehensive as to preclude any possibility of error", *Mackey v. Montrym*, 443 U.S. 1 (1979), but rather that the fundamental fairness of a particular procedure turns on the result obtained in the generality of cases. *Walters v. National Ass'n of Radiation Survivors*, 105 S. Ct. 3180, 3189 (1985).

In this case, the interest at stake, namely the parents' interest in the continued receipt of an appropriate special education for their children, though significant, does not rise to the level of the liberty interests at stake in such cases as *Gagnon v. Scarpelli*, 411 U.S. 778 (1978) (threatened revocation of probation), *Lassiter v. Dept. of Social Services*, 452 U.S. 18 (1981) (threatened termination of parental rights), or *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (welfare recipient threatened with termination of welfare benefits entitled to be represented by an attorney). Accordingly, the procedural safeguards due under law will be less extensive than those afforded in these cases.

In analyzing plaintiff's claim the court relies heavily on the reasoning of *Walters v. National Association of Radiation Services*, 105 S. Ct. 3130 (1985). The facts in *Walters* were analogous to those at hand. In that case, the Supreme Court overturned on direct appeal a district court order enjoining enforcement of a provision of the United States Code, 78 U.S.C. § 3404-3405, which limited fees for attorneys and claims agents for work in connection with veterans' benefits applications. The plaintiffs contended that the fee limitation deprived veterans of their property interest in the benefits by effectively foreclosing representation by expert legal counsel. The evidence in the record before the Court moreover established that claimants represented by lawyers had a "slightly higher success rate" in certain appeals. Nevertheless the court concluded that the fee limitation violated neither the speech rights nor due process rights of the plaintiffs under the First and Fifth Amendments. The Court held that plaintiffs failed to make out "an extraordinary showing of probability of error under the present system—and the probability that the presence of attorneys would sharply diminish that probability". Moreover, the Court explained that a finding that plaintiffs' speech rights were infringed would require a showing that the fee limitation precluded the plaintiffs from making a meaningful presentation of their claims in administrative proceedings before the Veterans Administration. The court found that neither showing was made on the record before it .

A similar conclusion must be reached in this case. By requiring an "extraordinarily strong showing of probability of error under the [challenged] system—and the probability that the [additional procedural safeguards sought] would sharply diminish that possibility", the Supreme Court imposed an exceedingly difficult threshold burden upon plaintiffs seeking to

invalidate a procedural limitation on due process grounds. Here, plaintiff would have to establish that absent representation by lay advocates, there is a strong probability that handicapped children will be placed into "inappropriate" special education environments and further that providing lay advocates the compensation sought would sharply reduce the possibility of inappropriate placement.

Nothing in the record supports a factual finding that absent lay advocate representation there is a significant probability of erroneous placement of handicapped children. Plaintiff introduces evidence of cases in which she appeared on behalf of parents before the OAL and prevailed. *See* Plaintiff's Brief in Opposition to the Motion for Summary Judgment. However, plaintiff's successes do not establish a systematic probability of error in OAL hearings where lay advocates do not represent parents. On the contrary, defendants introduce evidence of several instances where parents appearing before the OAL *pro se* have achieved some significant degree of success in obtaining the educational placement desired for their children. *See* Affidavit of Ronald Parker at ¶ 11, Exhibit M. Moreover the record reflects that the Department of Education and the OAL have undertaken to prevent any probability of error where parents appear *pro se* by devising a training video of a simulated due process hearing, as well as distributing training manuals and staging statewide education conferences. In addition, the OAL has promulgated rules relaxing procedural formalities for the benefit of *pro se* parties and seeking to minimize the procedural burdens on *pro se* applicants. N.J.A.C. 1:1-13.

Moreover, this court concludes that plaintiff is unable to make the very difficult factual showing that the additional procedural safeguard sought, namely compensation for lay advocates to ensure lay advocate representation, is necessary

to eliminate the possibility of erroneous placement. The recent amendment to Section 2 of the EAHCA enables prevailing parents to recover reasonable attorneys' fees. By providing the opportunity to recover such fees, the amendment greatly increases access to legal representation by an attorney for parents of handicapped children. Increased access to counsel adequately protects against the possibility of error thereby eliminating the alleged necessity for lay advocacy compensation. Accordingly, the court finds that no due process violation results from Rule 1:21-1(e)'s prohibition on compensation of lay advocates.

Finally, as in *Walters*, *supra*, the First Amendment claim advanced by plaintiff on behalf of the parents she represents is "inseparable" from the due process theories advanced. 105 S. Ct. at 3197. For all the reasons set forth above, this court concludes that the prohibition on lay advocate compensation does not preclude parents from making a meaningful presentation of their claims in due process hearings before the OAL.

II. *Plaintiff's State Law Claims*

It remains for the court to consider defendants' motion to dismiss plaintiff's state law claims for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1).

Plaintiff's complaint asserts three district claims against these individual agents of the Department of Education and the OAL. Specifically, plaintiff alleges that the defendants have publicly libeled and maligned her within the New Jersey special education community, in retaliation for her work representing parents in opposing local school boards. Second, plaintiff alleges that the defendants have misappropriated her name by listing her as a reference for parents and including her home address and telephone number in a Department of Education resource

guide, without her consent. According to plaintiff, this listing resulted in an overwhelming number of unsolicited applications by parents of the handicapped for her assistance.

And finally plaintiff asserts that defendants Osowski and Cooperman tortiously interfered with her application for a federal grant on behalf of the Teaneck Parent Information Center by endorsing the application of s rival special education advocacy project entitled "Project Involve".[9]

Relying on *Pennhurst State School and Hospital v. Halderman*, 465 U.S.89 (1984) defendants urge the court to dismiss plaintiff's state law claims. In *Pennhurst*, the Supreme Court specifically held that the Eleventh Amendment bars suits against state officials for violations of *state* law in carrying out their official duties. The Court found that such suits constitute suits against the state as real, substantial party in interest and are therefore within the scope of Eleventh Amendment immunity. Reasoning that a "federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law", the court concluded that there was no "greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law". *Id.* at 106.

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[9]It is undisputed by plaintiff that these defendants submitted her funding application to the appropriate federal authorities for consideration as required by the EAHCA. Nor does plaintiff dispute that the decision to deny funding was made at the federal level and it is not reviewable under the EAHCA. *See* Testimony of Deputy Attorney General Andrea Silkowitz, December 8, 1986. Plaintiff's claim is that the defendants' chose to exercise their discretion and write a recommendation of support of Project Involve rather than the Teaneck Parent Center. The court expresses some doubt as to whether these allegations state a cause of action. However, the court will not reach this question since it sees fit to dismiss on the basis of lack of subject matter jurisdiction.

The principles of federalism and comity underlying the Eleventh Amendment preclude this court from asserting jurisdiction over plaintiff's claims. Each state a cause of action in common law tort against a state official in his official capacity. Plaintiff's argument in opposition alleges that the abuses charged occurred in connection with the administration of the EAHCA, a federal statute, and therefore are not "state law" violations. The court finds that though the events giving rise to plaintiff's complaint relate to the administration of the EAHCA, that is irrelevant to the analysis. The legal derivation of these claims is located in state law.

Furthermore, plaintiff attempts to avoid the eleventh amendment by arguing that defendants' actions were in their individual and not their official capacities. The court disagrees. The conduct complained of was limited to actions taken by these defendants on the job and in furtherance of their responsibilities for administering the EAHCA in the State of New Jersey. Second, plaintiff argues that the suit here should not be considered to be against the State for purposes of the Eleventh Amendment because the defendants were acting *ultra vires* their authority. The Court in *Pennhurst* rejected a similar argument. 465 U.S. at 101, n.11. The Court explained that a state officer may be said to act *ultra vires* only when he acts "without any authority whatever". *Florida Dept. of States v. Treasure Salvors*, 458 U.S. 670 (1982). An *ultra vires* claim must rest on "the officer's lack of delegated power". *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). Where, as here the claim is that the defendants "erred" in the exercise of their power, or abused the discretion to which their delegated authority entitled them, this is not sufficient to support an *ultra vires* exception. *Larson, supra*, at 690.[10]

[10]In fact, the Supreme Court in *Larson, supra*, rejected the argument that alleging commission of a tort by a government official suffices to

Accordingly, the court concludes that it lacks jurisdiction under *Pennhurst* to entertain plaintiff's claims.

CONCLUSION

The plaintiff seeks to be compensated for services performed by her as a lay advocate acting on behalf of handicapped children and their parents. Although the applicable statute permits such assistance and recognizes the need for same, it provides for awards of compensation to attorneys only. Nor does the EAHCA obligate the state to provide compensation for lay advocates.

Plaintiff is uniquely qualified and experienced in this specialized field and undoubtedly performs an invaluable service. It may also be true, as she contends, that she is more knowledgeable in this field than most attorneys, even those who specialize in it.

However, absent the qualifications, standards, testing and regulation which governs attorneys, it is easy to understand the rationale for compensating attorneys, while declining to do so for lay advocates. Plaintiff performs a much needed service for her clients, one which may, in certain instances, warrant an award of compensation. However, plaintiff seeks an interpretation of the applicable statute and regulations which would constitutionally require such award, when none exists.

Legislation seems appropriate, and possibly necessary, to compensate those persons such as the plaintiff, who are providing a vital service to the handicapped which may not be available otherwise. However, that authority must come from Congress or the New Jersey Supreme Court and not from the

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distinguish the official from the sovereign. *See also Pennhurst*, *supra*, at 112.

federal judiciary. As of this moment, no matter how valuable or essential plaintiff's services may be, the court has no authority to require that she be compensated, and the denial of such fees does not violate either her constitutional rights or the rights of the handicapped whom she represents with such admirable dedication.

H. LEE SAROKIN, U.S.D.J.

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-938

MARILYN ARONS,

Applicant,

v.

NEW JERSEY STATE BOARD OF EDUCATION, *ET AL.*

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-referenced cause be, and the same is hereby, extended to and including *August 13*, 1988.

/s/ Wm. J. Brennan, Jr.

Associate Justice of the Supreme Court of the United States

Dated this 9th
day of June, 1988

No. 88-261

In The

Supreme Court of the United States

October Term, 1987

MARILYN ARONS,

Petitioner,

v.

NEW JERSEY STATE BOARD OF EDUCATION, et al.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is a state which accepts federal funding under the Education for All Handicapped Children Act and pursuant thereto agrees to accord a right to parents of handicapped children "to be accompanied and advised" in State administrative hearings "by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children . . . " compelled thereby to waive mandatory rules adopted by its Supreme Court governing non-lawyer representation or assistance in State administrative proceedings, including the prohibition of compensation of the non-lawyer for such services?

2. May a state, consistent with the dictates of the equal protection clause of the Fourteenth Amendment and in the absence of any federal statutory funding requirements, prescribe the conditions under which non-attorneys may represent or assist parties in State administrative hearings, including the waiver of fees for such representation or assistance?

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COUNTERSTATEMENT OF THE CASE

As a condition of its receipt of federal funding provided under the Education for all Handicapped Children Act, the State of New Jersey is required to comply with an extensive set of goals and procedures to ensure that all handicapped children have access to a free public education, 20 *U.S.C.* § 1400(c); *Bd. of Educ. of Hendrick Hudson Central School Dist. v. Rowley*, 458 *U.S.* 176, 179, 192, 200 (1982), including the establishment of procedural safeguards to protect the rights of handicapped children, parents and guardians (20 *U.S.C.* §§ 1412(5), 1415). Pursuant to this federal statutory scheme, whenever a parent

or guardian of a handicapped child presents a complaint with respect to "any matter relating to the identification, evaluation or educational placement of the child, or the provision of a free appropriate public education to such child . . . " (20 *U.S.C.* § 1415(b)(1)(E)), the parents or guardian must be afforded: the opportunity for an impartial "due process hearing" (20 *U.S.C.* § 1415(b)(2)); "the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children . . . " (20 *U.S.C.* § 1415(d)(1)); the right to present evidence and cross-examine witnesses; and the right to receive written findings of facts and decisions (20 *U.S.C.* § 1415(d)(2) to (4)). Through the State Plans submitted to the federal government and through regulations promulgated by the State Board of Education, New Jersey has adopted policies and procedures to meet the standards of the Education for all Handicapped Children Act, including the opportunity for a due process hearing conducted before the State's Office of Administrative Law ("OAL") (see *N.J.S.A.* 52:14F-1 *et seq.*).

* * *

In 1983 the Supreme Court of New Jersey, which regulates the practice of law within the State, responded to recommendations of its Committee on Civil Practice (Aa65 to Aa76) and amended its Court Rules to permit the appearance of non-attorneys under certain defined circumstances in hearings before the OAL "[s]ubject to such limitations and procedural rules" promulgated by

that agency.* In authorizing these appearances the Court emphasized however that such representation or assistance could not be undertaken "by any person who receives any fee for such representation." *N.J. Ct. R.* 1:21-1(e). Included among the permissible lay appearances were those "required by federal statute or regulation." *N.J. Ct. R.* 1:21-1(e)(1).

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* *N.J. Ct. R.* 1:21-1(e), as amended, provides in its entirety:

(e) Appearances Before Office of Administrative Law. Subject to such limitations and procedural rules as may be established by the Office of Administrative Law, an appearance by a non-attorney in a contested case before the Office of Administrative Law may be permitted, on application, in any of the following circumstances:

(1) where required by federal statute or regulation;

(2) to represent a state agency if the Attorney General does not provide representation in the particular matter and the non-attorney representative is an employee of the agency with special expertise or experience in the matter in controversy.

(3) to represent a county welfare agency if County Counsel does not provide representation in the particular matter and the non-attorney representative is an employee of the agency with special expertise or experience in the matter in controversy;

(4) to assist in providing representation to an indigent as part of a Legal Services program if the non-attorney is a paralegal or legal assistant employed by that program;

(Continued on following page)

Thereafter the Office of Administrative Law adopted regulations implementing all but one provision of *N.J. Ct. R.* 1:21-1(e) (namely, *N.J. Ct. R.* 1:21-1(e)(7), permitting lay representatives, not associated with a Legal Services agency, to assist indigent citizens). *See N.J.A.C.* 1:1-5.4. Specific provisions were also adopted permitting "non-lawyer representation" in special education hearings consistent with "Federal and State requirements." *N.J.A.C.*

(Continued from previous page)

(5) to represent a state, county or local government employee in Civil Service proceedings, provided (i) the non-attorney making such appearance is an authorized representative of a labor organization and (ii) the labor organization is the duly authorized representative of the employee for collective bargaining purposes;

(6) to represent a close corporation provided the non-attorney is a principal of the corporation;

(7) to assist an individual who is not represented by an attorney provided (i) the presentation appears likely to be enhanced by such assistance, (ii) the individual certifies that he lacks the means to retain an attorney and that representation is not available through a Legal Services program and (iii) the conduct of the proceeding by the Office of Administrative Law will not be impaired by such assistance.

No representation or assistance may be undertaken pursuant to subsection (e) by any disbarred or suspended attorney nor by any person who receives any fee for such representation.

1:1-5.4(b)(2)(iv); *N.J.A.C.* 1:6A-4.2.* As required by *N.J. Ct. R.* 1:21-1(e), OAL conditioned any non-lawyer's appearance upon express waiver of a claim for compensation. *N.J.A.C.* 1:1-5.4(b)(2)(vi).

Pursuant to the above rules petitioner Marilyn Arons, a professional educator,** obtained approval from OAL to assist parents in special education due process hearings at that forum. With the apparent acquiescence of individual Administrative Law Judges, Ms. Arons has been permitted to present and cross-examine witnesses

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* *N.J.A.C.* 1:1-5.4(b)(2)(iv) requires that

> [i]n special education hearings the non-lawyer applicant shall include in his or her Notice [of Appearance/ Application] an explanation of how he or she satisfies the Federal and State requirements for non-lawyer representation.

N.J.A.C. 1:6A-4.2, titled "Representation," provides:

> (a) At a hearing any party may be accompanied and advised by legal counsel or by individuals with special knowledge or training with respect to handicapped pupils and their education needs, or both;
>
> (b) A non-lawyer seeking to represent a party shall comply with the application process contained in *N.J.A.C.* 1:1-5.4 and shall be bound by the approval practices, limitations and practice requirements contained in *N.J.A.C.* 1:1-5.5.

** Ms. Arons has not been formally educated as a lawyer and is not admitted to the New Jersey bar (Aa6).

and to file legal briefs in these administrative hearings (App. 21a).*

Although Ms. Arons asserted repeatedly below that she was the "sole source of immediate and direct legal aid to parents" of handicapped children (Aa12) and the only "free or low-cost legal service in the State of New Jersey in the area of special education law." (Certification of Marilyn Arons at ¶ 39, attached to initial complaint), the trial court found plaintiff's allegations to be without factual support. See App. 21a to 22a. Thus, uncontroverted OAL records established that a substantial number of parents were represented without cost by the State Public Advocate's Division of Advocacy for the Developmentally Disabled, see *N.J.S.A.* 52:27E-41.1 *et seq.*, and/or a legal services office.** *Ibid.* Additionally, these

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* While this practice has been condoned by certain Administrative Law Judges, it has not been reviewed by the Supreme Court of New Jersey. That evaluation however may be required as a result of the ruling below (App. 7a) interpreting 20 *U.S.C.* § 1415(d)(1) as "not authoriz[ing] [lay advocates] to render legal services."

** During the period from September 3, 1982 through August 11, 1986, three attorneys from the Community Health Law Project represented parents in six OAL proceedings; parents in thirty-one additional cases in this same time period were represented by eight attorneys from the Public Advocate's office. These totals, of course, do not include additional assistance provided parents by the agencies' attorneys and professional staff in dissemination of information and in negotiating settlements at pre-OAL hearing stages. (See Affidavit of Sarah Mitchell at ¶¶ 3 to 6, Aa94 to Aa97.)

records revealed that several attorneys in private practice within the State of New Jersey had handled a significant number of special education cases on behalf of parents of handicapped children. See Affidavit of Ronald Parker at ¶s 5-7, 10 (Aa78 to Aa80). In total, over 200 private attorneys have appeared in special education hearings at OAL. See Exhibit A to Affidavit of Ronald Parker.*

In January 1985 petitioner filed a complaint *pro se*, in the Federal District Court for the District of New Jersey alleging "educational malpractice" by defendants, the New Jersey State Board of Education, the New Jersey Department of Education, the New Jersey Office of Administrative Law as well as high level officials of those

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* Parents have also appeared *pro se* at OAL hearings, see Affidavit of Ronald Parker at ¶ 11 and Exhibit M, achieving in certain cases some significant measure of success. To assist these parents (as well as those who appear with lay advocates) administrative law judges are required to apply OAL procedural rules so as not to impose excessive burdens with formal requirements, particularly, "relaxed for their benefit." *N.J.A.C.* 1:1-1.13. Furthermore, in conjunction with the Department of Education, OAL has made available to parents a videotape in which a simulation of a special education due process hearing is presented and discussed, see Affidavit of Nadia Delonas at ¶ 7 (Aa87); Affidavit of Ronald Parker at ¶ 14 (Aa81 to Aa82), and a manual outlining the format of due process hearings at OAL and providing specific information as to special education law. See Affidavit of Ronald Parker at ¶ 16 (Aa83). Further training and information for parents is made available by the Department of Education, OAL and the Public Advocate through statewide conferences, workshops, publications, mailing lists, and technical assistance provided by special education consultants. See Affidavit of Nadia Delonas at ¶s 12-15 (Aa89 to Aa92); Affidavit of Ronald Parker at ¶ 16 (Aa83); Affidavit of Sarah Mitchell (Aa93 to Aa97).

agencies, in implementing the State's program for special education of handicapped children (App. 2a, 19a n.). Predicting her suit upon the authority of 42 *U.S.C.* § 1983, Arons sought an order directing a forum other than the Office of Administrative Law to decide special education cases, suspension of the operation of the State's laws on special education until compliance could be determined by a federal monitoring team, and the placement in escrow of all federal funds for educational programs in New Jersey. In addition, monetary awards were requested for the purposes of training lay advocates, defraying legal fees and costs of administrative proceedings, providing subsidies to each classified handicapped child at age 18 and funding a parent/professional newsletter (Aa10 to Aa11). In response to the State's filing of a motion to dismiss the complaint for lack of standing and the failure to allege any valid cause of action as to which relief could be granted, petitioner later amended her complaint to allege that she suffered economic and other injury by reason of the State's actions, including the ability to obtain compensation for her services at OAL hearings (App. 19a n.). By Order and Opinion dated November 5, 1985, the Honorable H. Lee Sarokin, U.S.D.J., granted in substantial part defendants' motion to dismiss (*Ibid.*).

On October 16, 1986 and December 1, 1986, defendants moved pursuant to *Fed. R. Civ. Proc.* 12(b)(i) and 56(d) for an Order dismissing the claims which survived the initial motion to dismiss:

(1) claims for relief based upon the individual defendants' alleged wrongful publication of plaintiff's name, libelous statements and denial of funding to Arons;

(2) claims against all defendants as to the issue of Arons' entitlement to compensation under federal statutory and constitutional law for her lay advocacy work in special education hearings before the Office of Administrative Law. [App. 18a to 19a]

On April 27, 1987, Judge Sarokin issued a written opinion and order granting defendants' motions (App. 14a to 37a).

As to the compensation claim, the sole issue ultimately appealed, Judge Sarokin noted the absence of any language in the Education Act for all Handicapped Children itself imposing any requirement on the State or creating any rights in parents of handicapped children or lay advocates for compensation for these services (App. 23a). Of further significance to the Court was the failure of Congress in its 1986 amendment to the Act (*P.L.* 99-372) authorizing the award of attorney fees to successful litigants to provide any similar benefit to lay advocates. In the Court's view " . . . given Congressional recognition of lay advocate representation, 20 *U.S.C.* § 1415(d)(1), the failure to provide for lay advocate compensation in addition to the attorneys' fees provision strongly suggests an intentional omission" (App. 24a to 25a). Finally, in rejecting plaintiff's equal protection challenge to the no-compensation provision of *N.J. Ct. R.* 1:21-1(e) and *N.J.A.C.* 1:6A-4.2 and 1:1-5.4(b)(2)(vi), the Court noted among other things the distinction between attorneys and lay advocates, whose training in education would not qualify them to "hold themselves out as

'expert' " in the provision of legal services nor bind them to the same ethical and fiduciary restraints imposed upon the bar (App. 27a, 28a). In view of these distinctions the Court found the Supreme Court's prohibition of compensation for lay advocates "rationally related to the legitimate State interest in strictly regulating the practice of law by non-attorneys and maintaining the distinction between the licensed practice of law and the assistance of lay advocates" (App. 28a).

A Notice of Appeal was filed with the Clerk of the District Court on April 30, 1987 as to the compensation issue alone (Aa64). In its opinion and judgment dated March 16, 1988 the United States Court of Appeals for the Third Circuit affirmed the District Court's dismissal of the amended complaint (App. 1a to 15a). In rejecting the contention that the Supreme Court of New Jersey's no-fee rule "thwart[ed] the achievement of the goals Congress set" in the Education for All Handicapped Children Act by discouraging the use of lay advocate services in lieu of attorneys, the Court of Appeals noted that the "carefully drawn statutory language does not authorize these specially qualified individuals to render legal services":

> Although the Act does give '[a]ny party to any hearing' the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, *Id.* § 1415(d)(2), those functions are not designated to be performed by lay advocates. Furthermore, the statute does not use the word 'represent' in subsection (d)(1), as would be expected if Congress intended to place expert and legal counsel on the same footing. [App. 7a]

Based upon its review of the text of § 1415(d)(1), the legislative history of the Act as well as that accompanying the 1986 attorney fee amendment, the Court concluded that "substantial doubt" existed as to the claim that "Congress intended that no distinction be drawn between lawyers and lay advocates" (App. 8a). To the contrary, the Court of Appeals concluded that Congress' failure to include lay advocates within the attorney fees amendment was "unlikely . . . inadvertent" (App. 9a). In its view "[i]n the absence of explicit [statutory] provisions" mandating lay advocate compensation there was no basis upon which to find that Congress intended to supplant the historic role of the states in regulating the practice of law by prohibiting state regulation of lay advocates in state administrative proceedings (App. 9a to 10a). Based upon the reasoning of the District Court, the Court further rejected the equal protection challenge presented (App. 10a).

This petition for certification followed.

ARGUMENT

THE WRIT SHOULD BE DENIED BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT CORRECTLY CONSTRUED THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT AS NOT PROHIBITING STATES ACCEPTING FUNDING MADE AVAILABLE UNDER THE ACT FROM REGULATING THE MANNER AND CONDITIONS UNDER WHICH LAY ADVOCATES MAY ASSIST PARENTS OF HANDICAPPED CHILDREN AT STATE ADMINISTRATIVE HEARINGS CONDUCTED PURSUANT TO 20 *U.S.C.* § 1415.

In *Pennhurst State School and Hospital v. Halderman*, 451 *U.S.* 1, 17 (1981) this Court adjured the lower courts

that in reviewing statutory provisions of a federal grant-in-aid program they could recognize and enforce statutory rights as created under the federal statute only where there existed a corresponding obligation imposed by the statute upon the State in an "unambiguous" fashion. Where, however, Congress had failed to "express clearly its intent to impose conditions on the grant of federal funds so that the state c[ould] knowingly decide whether or not to accept these funds," 451 *U.S.* at 24, reviewing courts were not free to expand upon inchoate or precatory terms of the federal grant-in-aid statutes. Notwithstanding the clarity of the Court's opinion, petitioner herein asserts, in the absence of any express statutory directive or unambiguous legislative history, that Congress in enacting the Education for all Handicapped Children Act, 20 *U.S.C.* §§ 1400 *et seq.*, intended to condition a State's receipt of monies made available under the Act upon federal supercession of the traditional State prerogative of regulating the practice of law within State forums, in this instance by barring participating states from regulating the manner and terms under which non-attorneys may assist parents of handicapped children in State administrative hearings conducted pursuant to 20 *U.S.C.* § 1415(d)(1). Petitioner's contention, as the courts below properly concluded, finds no support in the language of the Act as initially enacted and as subsequently amended, its legislative history nor in any decision of this Court and thus warrants no further review by this Court.

Initially, it must be noted that nothing in the language of § 1415(d)(1), which accords to parents of handicapped children the right in state due process hearings

"to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children . . . " suggests, no less compels the conclusion, that Congress was according lay advocates any plenary right to act or be treated as lawyers in these State proceedings. The most that can be drawn from the statutory language is recognition of a party's right to appear and to be advised by special education experts at due process hearings. *See, Victoria L. by Carol A. v. District School Bd.*, 741 F.2d 369, 373 (11th Cir. 1984). On the significant issue of whether Congress intended to condition receipt of EACHA monies upon the State's recognition of these special education consultants as "legal experts" and thus entitled, as lawyers, to seek compensation for providing legal services, the statute is silent. As such, under *Pennhurst* the courts below properly refrained from finding supercession of State law to the contrary.

Further, as the Court of Appeals below recognized, Congress' enactment of the Handicapped Children's Protection Act of 1986, *P.L.* 99-372, dispels any question as to the earlier Congress' intent in adopting § 1415(d)(1). *See Bennett v. Ky. Dept. of Education*, 470 *U.S.* 656, 665 n. 3 (1985). Section 2 of that Act provides in pertinent part that "[i]n any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party." *See* 20 *U.S.C.* § 1415(e)(B). Nowhere however in the language of the amendatory Act, or in its legislative history, is there any discussion or provision for such fees to be afforded to lay advocates. *See 1986 U.S.*

Code Congressional & Administrative News, pp. 1798-1811. Certainly, if as petitioner contends, Congress intended there to be a presumption of equality between lawyers and lay advocates, authorization of a fee award would have been extended to lay advocates as well. The contrary result is of even greater significance given rulings by several federal courts that *P.L.* 99-372 empowers courts to award attorney's fees for administrative hearing activities. *See e.g., Eggers v. Bullitt County District*, 854 F.2d 892 (6th Cir. 1988); *Burr by Burr v. Ambach*, 683 *F. Supp.* 46 (S.D. N.Y. 1988); *Moore v. District of Columbia*, 666 *F. Supp.* 263 (D.D.C. 1987); *School Bd. of the County of Prince William v. Malone*, 662 *F. Supp.* 999 (E.D. Va. 1987); *Burpee v. Manchester School District*, 661 *F. Supp.* 731 (D.N.H. 1987); Senate Report of the Labor and Human Resources Committee of the United States Senate, S. Rep. No. 112, 99th Cong. 2d Sess. 2, reprinted in 1986 *U.S. Code Cong. & Adm. News*, 1798, 1800, 1804. *See also* 131 *Cong. Rec.* S10396, 10400 (July 30, 1985). *But see Rollison v. Biggs*, 660 *F. Supp.* 875 (D.Del. 1987). Insofar as the lay advocate's services are limited to the administrative hearing context, Congress' failure to afford parents a comparable right of compensation for those services lends substantial support to the view adopted by the courts below that disparity of treatment between attorneys and lay advocates is not inconsistent with congressional objectives in implementing the Act. Clearly, therfore, even assuming the correctness of petitioner's assertion that New Jersey's no fee rule will discourage lay advocates' participation in due process hearings, that result is no different than that

effected by Congress' decision to exclude lay advocates from the ambit of the attorney fee provision.*

Petitioner's further attempt to bolster her argument by reference to prevailing *federal* administrative practice is equally unpersuasive. The fact that many federal agencies pursuant to 5 *U.S.C.* § 555(b)** have opted to permit

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* There is no support for the petitioner's contention, however, that New Jersey Court Rule 1:21-1(e) will eliminate the availability of lay advocates. As the courts below recognized, the no-fee rule applies solely to compensation for *legal* services provided by the advocate; it in no way affects the ability of the non-attorney to seek and obtain compensation for services provided as an educational consultant or as an expert witness testifying on behalf of a party.

Nor is there any support for petitioner's claim that enforcement of the State rule presents parents with a two-fold choice: appear *pro se* or incur the expense of obtaining a lawyer. Certainly the record developed below points to the availability in New Jersey of free representation from at least one legal aid office as well as the Public Advocate's office (where no maximum income level requirement is imposed). Moreover with two hundred practitioners as of 1986 having handled one or more special education hearings at OAL, a large pool of legal talent can be tapped by parents in need of assistance. Given school districts' potential liability for attorneys' fees for administrative and court work, *see* discussion *supra*, these attorneys, as in the civil rights area, may have sufficient incentive to view these cases as worthy of pursuit irrespective of a client's ability to pay. Finally, even if a parent is unsuccessful in obtaining free or low cost legal services, numerous sources exist within the State to provide assistance to the parent appearing *pro se*. See p. 7 n. *supra*.

** 5 *U.S.C.* § 555(b) in pertinent part provides:

A person compelled to appear in person before an agency or representative therof is entitled to be accompanied,

(Continued on following page)

(with a variety of condition imposed) non-lawyer representation of parties appearing before these agencies and in many instances, the compensation thereof, provides little, if any, insight as what Congress' intent may have been with regard to 20 *U.S.C.* § 1415(d)(1)'s provision for state administrative special education hearings. Indeed, the absence of any express mandate requiring lay advocate representation in lieu of attorneys' or further direction as to lay advocate's entitlement to compensation speaks, if at all, to congressional intent to afford the states, as it did its executive agencies, the discretion to choose what conditions best serve the State's interests.*

(Continued from previous page)

represented, and advised by counsel or, *if permitted by the agency, by other qualified representative.* A party is entitled to appear in person or by or with counsel or other duly qualified representative in any agency proceeding. . . . *This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.* [emphasis supplied]

* Manifestly, in the absence of any statutory directions or compelling legislative history evidencing Congressional intent to deprive the State of its traditional prerogatives in the regulation of the practice of law, it can be reasonably concluded that Congress might have anticipated the State's opting for the practice of an agency such as the Immigration and Naturalization Service, which prohibits compensation of lay representative. See 8 *C.F.R.* § 292.1(a)(2)(ii), (3)(ii). Congress as easily could have focused on executive agency policies in other grant-in-aid programs such as AFDC, Medicaid and Food Stamps where *no* directive as to compensation of lay representatives in fair hearings is set forth. *See e.g.,* 45 *C.F.R.* § 205.10(a)(3)(iii); 7 *C.F.R.* § 253.7(g)(3).

In view of the above, petitioner's attempt to cast this case into the *Sperry v. The State of Florida ex rel The Florida Bar*, 373 *U.S.* 379 (1963) mold is, as the Court of Appeals determined, to no avail. That Congress in its enactment of legislation affecting practioners in the federal Patent Office may have intended to preempt State unauthorized practice of law policies to the extent that they prevented those practitioners from engaging in activity incident to their federal practice simply provides no basis for finding a similar preemptive intent in a provision of a grant-in-aid statute addressing *State administrative* practice. Of further significance, as the Court of Appeals recognized, is the distinction in the statutory language at issue in *Sperry*. *See* 35 *U.S.C.* § 31. (the Commissioner of Patents "may prescribe regulations governing the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Patent Office.) See also 37 *C.F.R.* § 1.31 (" . . . an applicant for patent . . . *may* be represented by an attorney *or* agent authorized to practice before the Patent Office . . . ") (emphasis supplied).* Also telling is the *Sperry* Court's discussion of proposed regulatory amendments which were rejected in 1948 on the grounds that under those amendments "states [would] have the power to circumscribe and limit the rights of patent attorneys who are not lawyers," 373 *U.S.* at 386-387. In the final

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* In contrast, the regulations enacted by the federal Office of Special Education mirror the language of § 1415(d)(1) permitting a parent's right to be "accompanied and advised by counsel and by individuals with general knowledge or training with respect to the problems of handicapped children." *See* 34 *C.F.R.* § 300.508(a)(1).

analysis however the absence of any "unambiguous" statement of legislative intent precluding states from establishing conditions upon lay advocates' appearances at due process hearings, no less dictating that they be permitted to charge for their representation at such hearings, renders the *Sperry* analogy wholly inapposite.

In sum, no convincing evidence exists to support the contention that Congress has mandated that lay advocates be permitted to represent parents of handicapped children at State administrative hearings (in lieu of attorneys) and to charge for their representation, even if inconsistent with State policies regulating the practice of law. The lower courts' rejection of that position thus raises no substantial question warranting consideration by this Court.

Petitioner's equal protection claim fares no better. Implicitly, petitioner recognizes that if the Court of Appeals' statutory ruling below is upheld, New Jersey's dissimilar treatment of licensed attorneys and individuals not admitted to practice in the State is unassailable under the applicable rational relationship test. See *Leis v. Flynt*, 439 *U.S.* 438 (1979); *Martin v. Davis*, 187 *Kan.* 473, 357 *P.*2d 782, (1960), app. dis. for want of a substantial federal question, *sub* nom. *Martin v. Walton*, 368 *U.S.* 25 (1961); *Ginsburg v. Kovrak*, 139 *A.*2d 889 app. dis. for want of a substantial federal question, 358 *U.S.* 52 (1958). As the courts below concluded, since New Jersey could ban the practice of law altogether by unlicensed individuals, the more limited restrictions imposed by *N.J. Ct. R.* 1:21-1(e) are equally permissible. *See Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 *U.S.* 328 (1986) (having chosen to legalize casino gambling Puerto Rico is not

barred by the First Amendment form taking less intrusive steps of reducing resident demand through restrictions in advertising).

However, even if the Court of Appeals' ruling as to the scope of 20 *U.S.C.* § 1415(d)(1) were in error insofar as it would permit states to limit lay advocates' activities to consulting and appearing as expert witnesses in the State due process hearings, the no-fee rule would still survive scrutiny.

As the courts below recognized the Supreme Court of New Jersey reasonably could have concluded that to permit non-attorneys with expertise in a subject area, to obtain direct or indirect compensation for their activities at OAL would encourage establishment of a "cottage industry" of lay advocates and/or foster an impression in the public or in that individual that his/her participation in the legal process in some fashion altered his status into one equal to that of an attorney. By prohibiting payment for the services provided by the lay advocate – an individual not qualified by legal education or licensure to provide legal services, and not subject to the strongest ethical and fiduciary constraints imposed upon the bar – the Supreme Court reasonably and permissibly drew distinctions between this group and licensed attorneys. *Turner v. American Bar Assoc.*, 407 *F. Supp.* 451 (N.D. Tex., W.D. Pa., N.D. Ind., D. Minn., S.D. Ala., W.D. Wis. 1975), aff'd *sub nom. Taylor v. Montgomery*, 539 *F.*2d 715 (7th Cir. 1976), and *Pilla v. American Bar Assoc.*, 542 *F.*2d 56 (8th Cir. 1976). In so doing New Jersey clearly has not treated similarly situated persons in a dissimilar fashion. Petitioner's suggestion that consumer confusion could be avoided by simply forbidding lay advocates from calling

themselves anything that suggests that they are lawyers clearly fails to address the Supreme Court of New Jersey's concern that permitting compensation for representation services might legitimize both in the advocate's and the public's mind an erroneous assumption – namely, that the advocate has expertise and training in the legal profession. Moreover, it certainly would do little to allay such fears in the case of petitioner who throughout the course of the District Court proceedings professed her expertise in special education law and her belief that the quality of the representation she provided was equal to that of an attorney.

However, all of this ultimately is beside the point. That the Supreme Court of New Jersey might have chosen a different approach to the problem does not establish the absence of any rationality in the restrictions adopted. The prohibition against compensation is based upon sound policy judgments within the competency of the Supreme Court of New Jersey and advances those policies in a reasonable fashion. Petitioner remains free under the Third Circuit ruling to earn a livelihood as an expert witness or consultant at OAL hearings. In thus delimiting her role as an advocate the State advances the public interest consistent with its traditional role of regulation of the practice of law within its jurisdiction. Petitioner's equal protection challenge to *N.J.Ct.R.* 1:21-1(e) thus provides no further basis for this Court's review.

CONCLUSION

For the above-stated reasons, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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By: Andrea M. Silkowitz
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DATED: October 13, 1988

No. 88-261

In The

Supreme Court of the United States

October Term, 1988

MARILYN ARONS,
Petitioner,

v.

NEW JERSEY BOARD OF EDUCATION, *et al.*,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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1. The most remarkable feature of respondents' brief in opposition ("Opp. Br.") is what it does not say. Thus, nowhere in respondents' lengthy opposition do they ever take issue with the principal argument made by petitioner: namely, that the ruling below threatens the fulfillment of the goals Congress set forth in the Education for All Handicapped Children Act ("EAHCA" or "Act") because it may well eliminate the availability of nonlawyer experts to advocate on behalf of children and parents in hearings held under the Act. Indeed, respondents only add fuel to petitioner's fears about the likely exclusion of lay advocates from EAHCA hearings, since respondents go out of their way to emphasize that the Third Circuit's ruling may require the Supreme Court of New Jersey to reconsider whether to allow lay advocates to play any representational role in EAHCA hearings. Opp. Br. at 6 n.*.

2. Nor do respondents forthrightly deal with petitioner's contention that the inevitable result of the ruling below — that

parents will be forced to either handle these hearings alone, or, for more affluent parents, incur the substantial expense of hiring an attorney — runs directly counter to Congress' clearly expressed intent in the Act. Respondents do not dispute that Congress sought to ensure that the dispute-resolution mechanism established by the Act, which plays a pivotal role in ensuring that the rights conferred by the Act are enforced, would be accessible to all parents, and would not pose the burdens and expenses ordinarily associated with litigation. *See* S. Rep. No. 168, 94th Cong., 1st Sess. 9 (1975). Rather, respondents suggest that the elimination of the availability of lay advocates would not hamper parents' ability to secure representation, since there are free legal services available and a large pool of lawyers with expertise in EAHCA hearings. Opp. Br. at 15 n.*.

In fact, the statistics in the record paint precisely the opposite picture. During the four year period covered by the statistics that respondents submitted in the district court, Ms. Arons handled 65 cases, which was twenty percent of all of the EAHCA cases before the State Office of Administrative Law during that time. In contrast, the only two sources of free legal services available in New Jersey — the Public Advocate's Office and the Community Health Law Project — handled 31 and 6 cases, respectively, or a total of less than ten cases a year for the entire State. Affidavit of Richard I. Parker, ¶¶ 5-10.

With regard to the availability of private counsel, the State's claim that two hundred practitioners have handled these cases (Opp. Br. at 15 n.*) is wholly disingenuous. Virtually all of these lawyers represent school boards — not parents. Indeed, according to respondents' statistics, only four attorneys in the State handled EAHCA hearings on behalf of parents during the four years studied, and none of these lawyers handled

anywhere near the number of cases that Ms. Arons did. Affidavit of Richard I. Parker, ¶¶ 5, 6, 7, 10. Thus, contrary to respondents' claim, the elimination of lay advocates will indeed force most parents either to handle the hearing alone or to bear the expense of hiring an attorney. That result cannot be reconciled with Congress' intent in the Act.

3. Instead of addressing petitioner's main arguments, respondents' opposition is devoted principally to pointing out that the EAHCA operates as a federal grant program, and, for that reason, courts should be wary about imposing a duty on participating states unless the duty has been "unambiguously" imposed by statute or regulation. Opp. Br. at 11-13, *citing Pennhurst State School and Hospital v. Haldeman*, 451 U.S. 1, 17 (1981). Thus, respondents argue, because Congress did not expressly state that lay advocates may represent parents in EAHCA, that is the end of the Court's inquiry.

No case cited by respondents, including *Pennhurst*, has insisted on the level of detail that is comparable to the Tax Code or a criminal statute on matters such as this, as respondents apparently contend. To the contrary, as *Pennhurst* and innumerable other cases make clear, the question is whether Congress has spoken with "a clear voice," and, in exploring that question, courts are free to, and in many cases must, look behind the language of the statute to ascertain Congress' intent. *Pennhurst, supra*, 451 U.S. at 17; *Bennett v. Kentucky Department of Education*, 470 U.S. 656, 669-70 (1985). Here, as petitioner demonstrated in her petition, and as New Jersey itself acknowledged when it permitted lay advocates to represent parents in EAHCA hearings because such representation is "required by federal statute," there can be no doubt that Congress intended that lay advocates be allowed to handle EAHCA proceedings. *See* N.J. Ct. R. 1:21-1(e), *reprinted in* Opp. Br. at 3 n.*; N.J.A.C. 1:6A-4.2(b), *reprinted in* Opp.

Br. at 5 n.*. Moreover, not only is the Third Circuit's ruling inconsistent with the State's longstanding construction of the Act as *requiring* it to allow lay advocates to represent parties in EAHCA proceedings, but it will also come as a surprise to the Department of Education, which has long recognized that "legal or [lay] advocate representation is essential for both sides" in EAHCA hearings and that in many states lay advocates provide a substantial portion of such representation. U.S. Department of Education, *Ninth Annual Report to Congress on the Implementation of the Education of the Handicapped Act*, 77 (1987).

Indeed, under the construction given by the Third Circuit, and now embraced by respondents, the key language in section 1415(d) is pure surplusage. Thus, although section 1415(d)(1) provides that parties to EAHCA have "the right to be accompanied or advised by individuals with special knowledge or training with respect to the problems of handicapped children," the court below held that it merely authorizes parents to have an experts attend hearings and render off-the-record advice — rights that plainly exist even in the absence of the statute. As a result, the interpretation developed below, which was urged by neither party, robs the operative language of section 1415(d) of any meaning, and hence review by this Court is required.

CONCLUSION

For the reasons stated above, and in the petition, this Court should grant the petition for a writ of certiorari.

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